



Citation: *LD v Canada Employment Insurance Commission*, 2022 SST 988

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: L. D.
Representative: J. D.

Respondent: Canada Employment Insurance Commission
Representative: Josée Lachance

Decision under appeal: General Division decision dated February 18, 2022
(GE-21-2593)

Tribunal member: Janet Lew

Type of hearing: Teleconference

Hearing date: June 21, 2022

Hearing participants: Appellant
Appellant's representative
Respondent's representative

Decision date: October 5, 2022

File number: AD-22-139

Decision

[1] The appeal is allowed. The matter will go back to the General Division for reconsideration on the issue of whether the Appellant, L. D. (Claimant), set personal conditions that limited his chances of going back to work.

Overview

[2] This is an appeal of the General Division decision. The General Division found that the Claimant set personal conditions that limited his chances of going back to work while attending school on a full-time basis. As a result, it found that he was unavailable for work after September 8, 2021. This disentitled him from receiving Employment Insurance benefits.

[3] The Claimant argues that the General Division made procedural and factual errors. In particular, he argues that the General Division did not let him fairly present his case. He also argues that the General Division overlooked important facts about his disability, his work experience, and his job search efforts. He asks the Appeal Division to allow his appeal and give the decision that he says the General Division should have given. He says the General Division should have found (1) that he had not set any personal conditions and (2) that he was available for work.

[4] The Respondent, the Canada Employment Insurance Commission (Commission), argues that, even if the General Division made any errors, that it would not have changed the outcome. The Commission asks the Appeal Division to dismiss the appeal.

[5] I have to decide whether the General Division made any jurisdictional, procedural, legal, or specific types of factual errors, before I can intervene.¹ If I find that

¹ See section 58(1) of the *Department of Employment and Social Development Act*. Factual errors are those upon which the General Division based its decision, and were made in a perverse or capricious manner or without regard for the material before it.

the General Division made one of these types of errors, then I have to decide upon the appropriate remedy to fix the error(s).

Issues

[6] The issues in this appeal are:

- a) Was the General Division process unfair?
- b) Did the General Division overlook some of the evidence?

Analysis

[7] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.²

Was the General Division process unfair?

[8] The Claimant argues that the General Division was unfair. In particular, he says that he did not get a chance to fairly present his case. He claims that the General Division should have been aware that he was arguing that retail work was unsuitable for him because of a disability. He says that the General Division should have asked him to provide evidence of his disability. That way, he would have been able to prove that retail work was unsuitable for him.

[9] The Claimant says that, if he had been able to prove that retail work was unsuitable, the General Division would have concluded that he had not restricted his job search efforts. He also says that the General Division would have concluded that he looked for jobs that were suitable for him.

[10] The Claimant also says that, if the General Division accepted that he had not restricted his job search efforts, it would have found that he had been available for work after all.

² See section 58(1) of the *Department of Employment and Social Development Act*.

– **The Claimant says his disability made retail work unsuitable**

[11] The Claimant acknowledges that he worked as a retail associate from October 2020 to April 2021. The evidence also shows that he worked in this area again from June to July 2021. Even though the Claimant had work experience in the retail industry, he did not look for any work in the area. But, he says that retail work was unsuitable because of his disability.

[12] The Claimant says that he has a disability that often causes high anxiety and stress. Being around others triggers this anxiety. He receives the disability tax credit. He undergoes periodic medical assessments. The assessments confirm his ongoing disability.

[13] The Claimant explains why he was able to work in retail from October 2020 to April 2021, despite his disability. He was able to work in retail then because of a limited number of customers. There were capacity restrictions during the pandemic. He also worked evenings when there were fewer customers. So, he was able to manage his anxiety and stress under these working conditions.

[14] However, the retail store moved to a larger location. And, capacity restrictions were lifted. This resulted in more customers. The Claimant says that having more customers triggered his anxiety.³ He found retail work unsuitable, given his disability.

[15] Thus, the Claimant looked for other employment that did not involve as much contact with people. He was able to find another job that did not expose him to many people. He was able to get this job the following week.

– **Evidence of the Claimant's disability at the General Division**

[16] The General Division had limited evidence of the Claimant's disability. The evidence consisted of the following:

³ See Claimant's Application to the Appeal Division--Employment Insurance, filed February 27, 2022, at AD1-9.

- In an email dated December 22, 2021, the Claimant wrote, “Even with a disability, [the Claimant] has been trying to overcome all obstacles on his own, be independent and not rely on others for support. Since Sept 8, 2021 [the Claimant] has had to get financial help from parents and other family members in anticipation of employment insurance benefits getting approved.”⁴
- In his appeal to the General Division, his representative wrote, “As a person with a disability [the Claimant], with the support of family and friends gave him the opportunity to gain meaningful employment. . . He did not communicate to the Employment Insurance agent that he has a disability. He is often private about this and tries to get through most obstacles with family support. He is a recipient of the Disability Tax Credit ...”⁵

[17] This evidence does not show how the Claimant’s disability might have made certain type of work unsuitable for the Claimant. For instance, this evidence does not say that the Claimant was unable to work in retail, that he could not have much contact with people, or that contact with others could trigger his anxiety and stress.

– **Producing medical evidence**

[18] The Claimant suggests that he could not have known that his medical status was at issue, so says the General Division should have let him know. And, he says that if the General Division needed evidence of his medical status, it should have asked him for it.

[19] Otherwise, the Claimant says that he should not have been expected to produce medical evidence without either the Commission or General Division asking for it. He says that his medical records are highly personal. His representative argued, “You just don’t throw it out there.”⁶

⁴ See Claimant's e-mail dated December 22, 2021, at GD2-1.

⁵ See Claimant's Notice of Appeal--Employment Insurance--General Division, filed December 22, 2021, at GD2-9.

⁶ Appeal Division hearing on June 21, 2022.

[20] The Claimant says the General Division should have asked him for his medical information and given him a chance to produce this information. He argues that it was unfair that the General Division did not give him a chance to provide his medical information to prove that his disability made retail work unsuitable.

– **Whether the General Division acted fairly**

[21] The General Division was under a general duty to ensure that the Claimant had a fair chance to present his case. This required the Claimant to know the case against him.

[22] The Claimant says that he was unaware that he needed to produce medical evidence to prove that his disability made some jobs unsuitable. He says the General Division should have asked him for his supporting medical information.

[23] However, the Claimant should have been aware of the issues and the evidence that he would need to prove his case. He should have also been aware that he would need to produce medical evidence if he wanted to prove that his disability made some jobs unsuitable.

[24] The Commission filed representations to the General Division. It set out the issues. It also listed the three factors that determine whether a claimant is available for work. One of the factors is showing efforts to find a suitable job. The Commission also attached a copy of the *Employment Insurance Regulations* to show what represents suitable employment.

[25] On top of that, the Commission had argued that the Claimant had not shown that his disability interfered with his ability to seek employment. The Commission wrote:

The appeal documents advise that the claimant has a disability. The claimant has not shown that his disability for which he receives a tax credit interferes with his ability to seek employment in any form. The medical that is on file in the GD2 [sic] declares that the claimant is capable of working.⁷

⁷ See Representations of the Commission to the Social Security Tribunal—Employment Insurance Section, at GD4-6.

[26] The General Division could not have known that the Claimant had a medical disability that made some jobs unsuitable. The evidence about his disability, as set out above, was very limited. The evidence did not suggest or hint to the fact that the Claimant's disability made some jobs unsuitable.

[27] Nothing in the evidence suggested the Claimant could not perform or return to doing retail jobs. In fact, the Claimant testified at the General Division hearing that he did not apply for jobs as a sales associate. It was not his typical work. He explained that he would not apply for these types of jobs because, "It's below the money that [he was] going to make on a boat and [he] also knew that [he was] getting the position this spring. [He] already knew that, so [he wasn't] not going to apply to somewhere like that because it's below [his] paycheque and not [his] field at all."⁸

[28] The Claimant simply did not mention that his disability made retail work unsuitable.

[29] Without any indication that the Claimant's disability made some types of work unsuitable, the General Division could not have known that this evidence was possibly relevant. So, there was no basis for the General Division to ask the Claimant whether he had produced all the necessary medical evidence to support his case and, if he had not produced the evidence he needed, to possibly consider adjourning the hearing to let the Claimant get these records.

[30] As the Commission had set out the issues, ultimately, it was up to the Claimant to decide what evidence he needed to prove his case and to produce that evidence. There is nothing to suggest that the General Division breached the rules of procedural fairness in this case.

⁸ At approximately 48:47 to 49:22 of the audio recording of the General Division hearing.

Did the General Division overlook some of the evidence?

[31] The Claimant argues that the General Division overlooked the following:

- a. The fact that the Claimant has a disability that makes retail work unsuitable,
- b. The hours that he worked in the fishing industry, and
- c. Whether he limited his job search to positions within the fishing industry.

– Evidence about the suitability of retail work

[32] I have already addressed whether the General Division overlooked the fact that the Claimant has a disability that makes retail work unsuitable. There was evidence of the Claimant's disability. But, the evidence did not suggest that the Claimant's disability made retail work unsuitable. Evidence of the impact of the Claimant's disability on the suitability of work simply was not before the General Division. The General Division could not have overlooked evidence that it did not have.

– Evidence about the Claimant's work in the fishing industry

[33] The Claimant argues that the General Division failed to recognize that the Claimant worked considerably more hours in fishing than the records of employment suggest. The Claimant was involved, for instance, in preparing for the fishing season. The records of employment did not catch these hours.

[34] The Claimant relies on this evidence to show that his "usual occupation" was in the fishing industry, rather than in the retail industry. So, he says that if retail was not his usual occupation, then it was unsuitable for him.

[35] However, the Claimant acknowledges that the General Division did not have any evidence to show how much time the Claimant spent in the fishing industry. The General Division could not have overlooked evidence that it did not have.

– **Evidence about the Claimant’s job search efforts**

[36] Finally, the Claimant says that the General Division overlooked evidence that showed the scope of his job search. He says that the evidence proves that he looked for work beyond the fishing industry. By overlooking this evidence, the Claimant says that the General Division made two factual errors about his job search efforts:

- i. It said that he was pursuing training and education to advance his career as a fisher, and
- ii. It said that he limited his job search to positions within the fishing industry.

[37] The Claimant says that, if the General Division had accepted that he had looked for work beyond fishing-related jobs, it would have found that he had not set personal conditions or restricted his availability.

[38] The Claimant produced two emails, showing that he sent his resume to two shipping companies.⁹ The Claimant also referred to a letter. In it, he wrote that he had applied for a student assistant position at school. He described it as a 40-hour per semester job. The job would have accommodated his schedule between courses. The school did not consider his application because it was late.¹⁰

[39] I find that the General Division was aware that the Claimant applied for other jobs, including with shipping companies. The General Division noted that the Claimant had applied for a job as a deckhand in September 2021.¹¹ It also noted that he had applied for three more jobs with shipping companies in November and December 2021.¹²

[40] It is unclear whether the General Division considered these jobs, including those with the shipping companies, as fishing related, or whether it regarded “fishing” to include all marine-related jobs.

⁹ See Claimant’s emails dated December 4, 2021, at GD2-28 and GD2-29.

¹⁰ See Claimant’s request for reconsideration letter dated November 8, 2021, at GD2-25.

¹¹ See General Division decision, at para 19.

¹² See General Division decision, at para 20.

[41] It is clear however that the General Division made a factual error when it found that the Claimant limited his job search to positions within the fishing industry (whether this included the marine industry generally or not). While the Claimant may have focused his job search efforts on the fishing and marine industry generally, he had applied for a student assistant position. The Claimant suggests that this position was unrelated to the fishing industry.

[42] The General Division overlooked the fact that the Claimant had noted in his letter that he had applied for the student assistant position.

[43] The General Division does not have to refer to all of the evidence before it. But, at the same time, it should guard against making overly broad generalizations, as that could lead to a factual error, as it did in this case.

[44] The Commission accepts that the General Division overlooked the fact that the Claimant had applied for work outside the fishing industry.

Remedy

[45] The General Division made a factual error by overlooking the fact that the Claimant had applied for work outside the fishing industry. But, the Commission argues that that does not change the outcome. The Commission says the factual error is relatively minor and that it does not change anything. In other words, the Commission says the result would have been the same anyway, even if the General Division had not made this error.

[46] The Commission argues that the Claimant still set personal conditions that limited his chances of going back to work. The Commission argues that the evidence shows that the Claimant did not take on other suitable work for which he was qualified. In other words, the Commission says that the evidence shows that the Claimant could have also looked for work in the retail sector.

[47] The evidence that was before the General Division would seem to support the Commission's position. None of the evidence at the General Division suggested the

Claimant's disability made work in the retail sector inappropriate. Indeed, the Claimant explained that he did not apply for work in the retail sector because it "was not his typical work"¹³ and such jobs paid relatively poorly. He testified that he:

Wouldn't apply for them because it's below the money [he was] going to make on a boat, and [he] also knew that [he was] getting the position this spring. I already knew that so [he] wasn't going to apply to somewhere like that because it's below [his] paycheque and [indecipherable].¹⁴

[48] The Commission argues that the Claimant limited his job search to exclude work for which he was suitable. The Commission says that this reduced the Claimant's chances of going back to work.

[49] Some of the evidence also suggested that the Claimant restricted when he was available for work. For instance, a letter from the owner and operator of a fishing vessel noted that he had offered employment to the Claimant. The owner wrote, "We agreed that he would be available 2-3 evenings a week and weekends."¹⁵

[50] However, at the General Division hearing, the Claimant denied that he limited his job search to evenings and weekends. He testified that he was willing to leave his training if an employer offered him a job that conflicted with his course schedule.

[51] The General Division accepted this evidence. The General Division noted that the Claimant had applied for several full-time jobs, which would require him to leave his course. The General Division found that this supported the likelihood that the Claimant was willing to leave his training to accept a full-time job.

[52] The General Division concluded that the Claimant did not restrict his availability based on his school schedule. I note that the Commission did not contest these particular findings.

¹³ At approximately 48:53 of the audio recording of the General Division hearing.

¹⁴ At approximately 48:54 to 49:09 of the audio recording of the General Division hearing.

¹⁵ See letter dated November 8, 2021, from owner and operator of fishing vessel, at GD2-26 and GD3-27.

[53] On its face, it appears that the Claimant limited his job search to exclude work for which he was suitable. However, it also appears that there may be gaps in the evidence. They stem from the possibility that there may not have been an appreciation of or grasp of the nature and type of work that the Claimant sought.

[54] There is some need for clarification of this evidence. For this reason, I would return this matter to the General Division for a redetermination on the issue of whether the Claimant set restrictions that unduly limited his chances of returning to work.

[55] The Claimant may revisit the issue regarding his medical condition on the suitability of work in the retail industry. But, it would seem that he would need to produce fairly compelling evidence to support his claim that he could not do retail work because of his anxiety. Anecdotal evidence alone likely will not be strong enough.

[56] For greater clarity, the redetermination should not include re-examining whether the Claimant restricted his availability because of his school schedule. The Commission did not contest the General Division's findings on this point, so I would not interfere with it and the General Division should not re-examine the matter.

Conclusion

[57] The appeal is allowed. The General Division made a factual error about the type of work that the Claimant sought. This matter shall be returned to the General Division for a redetermination on the issue of whether the Claimant set personal restrictions on his job search, subject to my comments above.

Janet Lew
Member, Appeal Division